Filed 4/15/19 P. v. Lawrence CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. HERBERT LAWRENCE, Defendant and Appellant.	B285102 (Los Angeles County Super. Ct. No. TA142542) **ORDER MODIFYING OPINION; NO CHANGE IN JUDGMENT**

The opinion filed April 10, 2019, and not certified for publication, is modified as follows:

1. On page 14, footnote 5, insert the word "not" between the words "he does" and "support." The sentence, as modified, reads:

   Lawrence asserts the court's error "was not harmless because had the jury heard the evidence of the victim's proclivity for violence it is reasonably probable the jury would have reached a result more favorable to [him],"

but he does not support his assertion with any analysis or authority.

This order does not change the judgment.

ZELON, Acting P. J.
FEUER, J.

SEGAL, J.

Filed 4/10/19 P. v. Lawrence CA2/7 (unmodified opinion)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. HERBERT LAWRENCE, Defendant and Appellant.	B285102 (Los Angeles County Super. Ct. No. TA142542)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed.

Karyn H. Bucur, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Charles J. Sarosy, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Herbert Lawrence of attempted voluntary manslaughter as a lesser included offense of attempted murder, as well as other crimes, and found true firearm and great bodily injury allegations, after Lawrence shot an unarmed man multiple times at a gas station. Lawrence argues that the trial court erred in precluding him from questioning the victim under Evidence Code section 1103 about prior instances of violence and that we should remand the case for resentencing under recent amendments to the statute governing the firearm enhancement. Because the trial court did not commit reversible evidentiary error and remand is not appropriate in the circumstances of this case, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Lawrence Fires Shots at a Gas Station*

At 10:00 p.m. on New Year's Eve John Buckner and his girlfriend, Ellie Richards, stopped at a gas station to buy some cigarettes. Lawrence, with a "stale" expression on his face and "looking crazy," walked slowly in front of Buckner's car. Buckner, who was already angry and frustrated because he had been arguing with Richards, honked the horn and got out of the car. Buckner approached Lawrence and yelled, "What the fuck you doing?" and "You know where you at?" and "Who are you? What are you doing?"[1] Buckner was "on it" because, even though

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[1] The gas station was in a dangerous neighborhood in Inglewood controlled by the Bounty Hunters, a criminal street

Buckner knew everyone in the neighborhood, he did not recognize Lawrence and because Lawrence had a "like-he-didn't-care" look on his face. As Buckner, who wore his pants low and sagging, approached Lawrence, he pulled up his pants by his belt or waistband. Lawrence turned and backed away from Buckner, and Buckner followed him.

Lawrence pulled out a gun and shot Buckner as Buckner brought his arms toward his chest, "balling up," to protect himself. Buckner ran to the side of the gas station store, and Lawrence fired several more shots. Buckner eventually made it back to his car, and Richards drove him to the hospital, where he was treated for three gunshot wounds. Neither Buckner nor Richards had a gun that evening.

There was conflicting evidence whether Buckner was a member of the Bounty Hunters criminal street gang. Buckner testified that he grew up around gangs, but that he was not a member of the Bounty Hunters or any other gang, although he associated with people who were members of the Bounty Hunters. Buckner had numerous tattoos, but explained they were his mother's name, his nickname "JB" (his initials), Freddy Krueger, Felix the Cat, money bags, and a "collage of money and flames." Lawrence introduced photographs of Richards making a gang sign used by the Bounty Hunters and other "blood gangs" and of Buckner making a similar sign.

Lawrence experienced his encounter with Buckner differently. Lawrence stated that, after paying the gas station attendant, he walked back to his car to pump the gas. Buckner

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gang. There were bullet holes in the building from a prior gang-related shooting.

drove up in a black car, almost hit him, honked the car's horn, and told Lawrence to get out of the way. Buckner angrily and aggressively asked Lawrence why he was walking so slowly and what he was doing there. Lawrence, annoyed Buckner had honked at him, said loudly, "I'm just minding my business." Buckner said, "Who you getting loud with? Don't you know you'll get smoked over here?" These words made Lawrence think Buckner was a member of the Bounty Hunters. Buckner said, "Get up out of here before you get smoked."

Lawrence backed up and turned around. Buckner reached for his pants, which to Lawrence meant Buckner had a weapon. Lawrence kept walking away and looked over his shoulder at Buckner. When Lawrence saw Buckner reach for something shiny, he thought Buckner was going to take out a gun and shoot him. Fearing for his life, Lawrence took out his gun and shot Bucker.

Lawrence admitted he was a member of the Inglewood Family Bloods criminal street gang with the moniker "Rampage" (because, according to Lawrence, he used to fight a lot when he was younger), but stated he did not commit crimes for the gang. Lawrence had 15 tattoos showing his allegiance to the Inglewood Family Bloods, including "IFGB," which stood for "Inglewood Families Gangster Bloods." In a recorded jail call, Lawrence said, "I'm killa from Inglewood Families," although Lawrence stated "killa" meant "cool."[2]

Sheriff's deputies later recovered four expended shell casings from the scene. They also obtained from the gas station a

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[2] Lawrence explained he used "killa" instead of "cool" because "cool" was "something Crips say," and he was "a Blood."

surveillance video recording of the incident showing the confrontation between Lawrence and Buckner and Lawrence firing five shots at Buckner, several of which were after Buckner had run away from Lawrence and towards the gas station store. Later, in a search of a bedroom Lawrence occasionally used, sheriff's deputies found a .40 caliber semiautomatic pistol loaded with a magazine clip containing live ammunition and two additional magazines.

B. *The Jury Convicts Lawrence, and the Trial Court Imposes Upper Terms*

The People charged Lawrence with attempted willful, deliberate, and premeditated murder, assault with a semiautomatic firearm, and possession of a firearm by a felon. The People also alleged Lawrence personally used and discharged a firearm within the meaning of Penal Code sections 12022.5, subdivision (a), and 12022.53, subdivisions (b), (c), and (d), served three prison terms within the meaning of Penal Code section 667.5, subdivision (b), and had a prior conviction for a serious or violent felony within the meaning of the three strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12). The People also alleged Lawrence personally inflicted great bodily injury within the meaning of Penal Code section 12022.7, subdivision (a).

The jury found Lawrence not guilty of attempted murder but guilty of attempted voluntary manslaughter, assault with a semiautomatic firearm, and possession of a firearm by a felon. The jury also found true the firearm allegation under Penal Code section 12022.5, subdivision (a), and the great bodily injury allegation under Penal Code section 12022.7, subdivision (a). Lawrence admitted the prior felony conviction allegations.

The trial court sentenced Lawrence to an aggregate prison term of 35 years four months, which included the upper term of nine years for the assault with a semiautomatic handgun conviction (doubled under the three strikes law) and the upper term of 10 years for the firearm enhancement under Penal Code section 12022.5, subdivision (a).

DISCUSSION

A. *The Trial Court's Erroneous Exclusion of Evidence Under Evidence Code Section 1103 Was Harmless*

1. *Relevant Proceedings*

Prior to trial, and in support of his self-defense theory, Lawrence moved under Evidence Code section 1103 to admit evidence of prior incidents of violence by Buckner, including evidence of a fight in 2008 for which Buckner was arrested and charged with murder, but which the jury acquitted him of based on self-defense. Counsel for Lawrence argued the incident, which involved Buckner using a gun, was relevant to show Buckner, in his altercation with Lawrence at the gas station, acted in conformity with a trait for violence and made it "more likely [Buckner] would have reached for a gun on this occasion." Counsel for Lawrence argued the evidence was admissible under Evidence Code section 1103 because it showed "the proclivity for violence on the part of the victim." The court denied, under Evidence Code section 352, Lawrence's request to introduce evidence of the 2008 incident, stating: "I don't think it's particularly relevant for this particular trial, especially based on the facts that have been presented with regard to that prior

incident." When counsel for Lawrence asked whether the court was excluding evidence Buckner was acquitted of the charges relating to the 2008 incident and whether counsel could "still ask about a pattern of violent behavior [Buckner] may have engaged in," the court stated, "No, you cannot."[3] When counsel for Lawrence argued he wanted to ask Buckner about incidents of violence other than the 2008 fight, the court stated, "Oh, you're not going fishing. We're not going fishing."

"The Court: Okay. So my question is: What . . . character trait and what exact conduct are you going to be asking about?

"[Counsel for Lawrence]: I have a good faith basis for believing that the victim—

"The Court: No. No. . . . When I ask a question, I need you to answer it directly.

"[Counsel for Lawrence]: Yes, Your Honor.

"The Court: What exact conduct—not fishing, not asking him a question and see what comes up, because that's not going to happen. What character trait and what specific conduct are you seeking in, other than the [2008] murder?

"[Counsel for Lawrence]: Violence and violent acts carried out in furtherance of gang activity.

"The Court: What good faith belief do you have that this person has been involved in violence, outside of this one murder case that we're talking about?

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[3] When counsel for Lawrence sought to make an additional argument in support of admitting evidence of Buckner's history of violence, the court stated, "Well, no. We don't get to keep on doing that, counsel. Maybe you've never been in a court where they don't let you argue and argue and argue after the court rules. This is one of those courts."

"[Counsel for Lawrence]: That the victim has stated that he was in a gang.

". . . .

"The Court: Are you saying all gang members are involved in violence?

"[Counsel for Lawrence]: I'm saying there's a higher likelihood that someone who is a gang member and who is referencing the gang member in a confrontational manner, at night, is more likely to have violent instances in his past. That's why I'm not asking to say that, but rather to simply ask the witness that.

"The Court: Okay. I'm going to go ahead and sustain counsel's objection with regard to relevance. And also I don't think you have a good faith belief to ask that question. And if you're pitching that everybody that says they're in a gang or associates with a gang, that always is involved in violent conduct, that's not my experience."

The issue arose again during a break in jury selection. The prosecutor, acknowledging the court had precluded counsel for Lawrence from asking Buckner about his propensity for violence, requested permission to ask Buckner if he was a gang member, which the prosecutor believed Buckner would answer, "No." The court told the prosecutor, "You can do what you want," and asked counsel for Lawrence if he had any objection. Counsel for Lawrence inquired whether the court would allow him to follow up by asking Buckner whether he was affiliated with a gang or associated with gang members, and the court said, "Sure." Counsel for Lawrence also inquired if he could follow up by asking Buckner, "Have you committed violent acts in the past," to which Buckner could answer "yes" or "no."

"The Court: No. No. We're not—we already rehashed that. You can't just go on a fishing expedition and say, 'Hey, have you done anything violent in the past?' . . . . You can't just go in and just say, 'Hey, you done anything violent in the past?' without a good faith belief, outside of the [2008] murder that we've already discussed, that he has committed.

"[Counsel for Lawrence]: I would just maintain what I had maintained earlier, which is that my good faith belief is that—

"The Court: Okay. Did you just say that you did it earlier? So, therefore, you're repeating yourself, right?

"[Counsel for Lawrence]: Yes, Your Honor.

"The Court: So I don't need to hear it again, unless something else comes up.

"[Counsel for Lawrence]: Can I just put on the record what the basis is here for my objection to the ruling, for appellate purposes?

"The Court: You already did.

"[Counsel for Lawrence]: For this issue.

"The Court: So you want to repeat it?

"[Counsel for Lawrence]: On the gang issue.

"The Court: Go ahead. Go ahead and repeat yourself again.

"[Counsel for Lawrence]: The basis is that he—I have a good faith basis for believing that he is in a gang, and I would want to be able to ask about whether he's committed any violent acts for the gang.

"The Court: What good faith basis do you have that he has committed violent acts?

"[Counsel for Lawrence]: Gang membership."

Counsel for Lawrence also argued that Buckner's participation in the 2008 fight, along with his use of a gun in that incident, provided an additional good faith basis for asking Buckner about specific instances of violent conduct, even though the court had ruled Buckner's use of a gun was inadmissible. Counsel for Lawrence also argued that the fact Buckner had multiple bullet wounds, even if not admissible, provided a further good faith basis for asking Buckner about past instances of violent conduct. Counsel argued: "The burden for just asking the question is a good faith belief," not having "to prove by a preponderance of the evidence that it is true." The court again sustained the prosecutor's objection.

2. *The Trial Court's Error in Refusing To Allow Counsel for Lawrence To Ask Buckner About Prior Instances of Violent Conduct Was Harmless*

Evidence Code section 1101, subdivision (a), provides that "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Evidence Code section 1103 provides an exception: In a "criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by [Evidence Code s]ection 1101 if the evidence is . . . [o]ffered by the defendant to prove conduct of the victim in conformity with the character or trait of character." (See *People v. Fuiava* (2012) 53 Cal.4th 622, 695; *People v. Myers* (2007) 148 Cal.App.4th 546, 552.) We review for abuse of

discretion a trial court's rulings on the admission or exclusion of evidence under Evidence Code sections 1101 and 1103. (*People v. Thompson* (2016) 1 Cal.5th 1043, 1114; *People v. Davis* (2009) 46 Cal.4th 539, 602; *People v. Gutierrez* (2009) 45 Cal.4th 789, 827.)

The trial court abused its discretion in sustaining the prosecutor's objection to questions about Buckner's past instances of violent conduct on the grounds that the questions were not relevant and that counsel for Lawrence did not have a good faith basis for asking the questions.[4] First, the questions sought relevant information. Character evidence to prove propensity is relevant; the issue is whether it is inadmissible despite its relevance. (See *People v. Jackson* (2016) 1 Cal.5th 269, 300 [""[t]he inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury""]; *People v. Falsetta* (1999) 21 Cal.4th 903, 915 [propensity evidence ""is [deemed] objectionable, not because it has no appreciable probative value, *but because it has too much*""]; *People v. Ortiz* (2003) 109 Cal.App.4th 104, 111 [the reason for precluding evidence of uncharged misconduct "is not that it lacks relevance"; "[r]ather, it is the concern that such evidence may be regarded by the trier of fact as *too* relevant"].) Evidence Code section 1103 provides an exception for relevant character evidence concerning the victim that Evidence Code section 1101 would otherwise bar.

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[4] In contrast to what happened with the evidence of Buckner's 2008 acquittal on murder charges, the prosecutor did not object to, and the court did not exclude, evidence of Buckner's past instances of violence under Evidence Code section 352. The People concede the trial court "barred defense counsel from pursuing this line of questioning for lack of relevance and lack of counsel's 'good faith belief to ask that question.'"

Second, it is true that, to impeach a witness's credibility with nonfelonious conduct reflecting moral turpitude, the "proponent of the impeachment evidence must have a good faith basis for asking the question." (*People v. Pearson* (2013) 56 Cal.4th 393, 434; see *People v. Ramos* (1997) 15 Cal.4th 1133, 1173 ["the primary concern in restricting impeachment inquiry . . . is with the good faith belief in its foundation"]; *People v. Steele* (2000) 83 Cal.App.4th 212, 223 [counsel for defendant had a right to question a witness about misdemeanor conduct where counsel had a good faith belief, not "unfounded innuendo," of a prior conviction].) The People, however, cite no authority applying this requirement to evidence introduced, not to impeach the victim's testimony, but to show the victim acted in conformity with a trait under Evidence Code section 1103.

But even if there is such a requirement, counsel for Lawrence had a good faith basis for asking Buckner about whether he had engaged in acts of violence. There was evidence Buckner was a member of or associated with a criminal street gang. Gang members commit crimes, many of which involve violence. (See Pen. Code, § 186.21 [the Legislature has found "that the State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods"]; *People v. Briceno* (2004) 34 Cal.4th 451, 462 ["'[c]riminal street gangs have become more violent, bolder, and better organized in recent years'"]; *In re H.M.* (2008) 167 Cal.App.4th 136, 146 ["[i]t is common knowledge that in Los Angeles, gangs have proliferated and gang violence is rampant" and that "members of criminal street gangs often carry guns and other weapons"]; *People v. Avitia* (2005) 127

Cal.App.4th 185, 194 ["[i]t is common knowledge that gang members commit crimes, often with firearms"].) Buckner had engaged in violence at least once, when he fought and killed another man. As counsel for Lawrence properly argued, evidence of that incident, even though the court ruled it was inadmissible under Evidence Code section 352, gave counsel a good faith basis to ask Buckner, while Buckner was on the witness stand testifying for the prosecution, about other instances of violent conduct. In addition, there was evidence Buckner had been involved in incidents resulting in gunshot wounds. Although the trial court correctly observed Buckner may have been an innocent victim in whatever events left him with those injuries, and even if the court prohibited counsel for Lawrence from asking Buckner how he suffered those injuries, Buckner's bullet wounds provided a further good faith basis for allowing counsel for Lawrence to question Buckner under Evidence Code section 1103. Buckner may have denied he had committed any acts of violence, in connection with gang activity or otherwise, and there may have been nothing counsel for Lawrence could have done about such a denial, but under Evidence Code section 1103 counsel for Lawrence was entitled to ask the question.

To be sure, "counsel must not be permitted to take random shots at a reputation imprudently exposed, or to ask groundless questions 'to waft an unwarranted innuendo into the jury box,'" and "[t[here is . . . a responsibility on trial courts to scrupulously prevent cross-examination based upon mere fantasy." (*People v. Eli* (1967) 66 Cal.2d 63, 79.) Counsel for Lawrence, however, had more than innuendo and fantasy. He had evidence Buckner was a gang member, had been in violent altercations, and lived through exchanges of gunfire. To the extent counsel for

Lawrence may have been fishing a bit, it was with a good rod in a well-stocked pond. (See *People v. Wright* (1985) 39 Cal.3d 576, 584-585 ["'trial judges in criminal cases should give a defendant the benefit of any reasonable doubt when passing on the admissibility of evidence as well as in determining its weight'"].) Cross-examination of Lawrence's primary accuser was not so much a matter of fishing as a constitutionally guaranteed manner of challenging whether the People could meet their burden of proof beyond a reasonable doubt.

The trial court's error in precluding counsel for Lawrence from asking Buckner about specific instances of violence, however, was harmless because, even if the court had allowed counsel for Lawrence to question Buckner on that topic, there is no reasonable probability the verdict would have been any different. (See *People v. Gutierrez*, *supra*, 45 Cal.4th at pp. 827-828 [any error in excluding evidence of the victim's propensity for violence was harmless under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)]; *People v. Chandler* (1997) 56 Cal.App.4th 703, 710-712 [error in excluding evidence under Evidence Code section 1103 "was harmless because, viewing the entire record, it is not reasonably probable the error affected the verdict"].)[5] Significantly, Lawrence was able to present other evidence he acted in self-defense. Lawrence testified that he saw Buckner reach for what looked like a gun as Lawrence walked

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[5] Lawrence asserts the court's error "was not harmless because had the jury heard the evidence of the victim's proclivity for violence it is reasonably probable the jury would have reached a result more favorable to [him]," but he does support his assertion with any analysis or authority.

away from him and that he shot Buckner because he feared for his life. Buckner testified he shouted at Lawrence as he approached him and reached for his belt or waistband. Both men testified Buckner was angry and aggressive. And there were photographs of Buckner and Richards making hand signs that suggested they were members of or affiliated with the Bounty Hunters criminal street gang.

Moreover, the videotape showed the jury that Lawrence continued to shoot Buckner after Buckner ran to the side of the gas station store to protect himself and after any danger possibly justifying self-defense had passed. Lawrence testified that, by the time he fired the second and third shots, Buckner was running away from him and that, by the time he fired the fourth shot, he could have returned to his car and driven away.[6] Thus, this was not a case where the only evidence before the jury was two conflicting versions of the same violent incident, one by the victim and one by the defendant, where evidence of the victim's reputation for or history of violence may have made a difference. Here, the jurors saw a video recording of the entire encounter between Buckner and Lawrence (although, because the recording was soundless, the jurors could not hear what the two men said to each other) and were able to evaluate the testimony of Lawrence and Buckner in light of the video. There was no reasonable probability that evidence of instances of violent conduct by Buckner, in the unlikely event he may have admitted

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[6] Lawrence stated that, after he fired the fourth shot, he was "skipping, hopping, [and] fittin' to jump in the front" of his car, but he decided to fire a fifth shot as Buckner was taking cover by the gas station store.

any, would have made any difference in the outcome of the trial. (See *People v. Gonzalez* (2018) 5 Cal.5th 186, 200, fn. 4 ["[u]nder *Watson*, the error is harmless unless there is a reasonable probability of a different result absent the error"]; *People v. Brooks* (2017) 3 Cal.5th 1, 52 [any error in excluding evidence of the victim's prior felony conviction was harmless "because there is no reasonable probability that a more favorable result would have occurred had the prior conviction evidence been admitted"].)

Finally, Lawrence argues "the trial court's decision to not allow his counsel to cross-examine Mr. Buckner [on] his proclivity for violence result[ed] in a due process violation because the inability of [Lawrence] to present evidence establishing that he acted in self-defense made the trial fundamentally unfair." The trial court's ruling, however, did not preclude Lawrence from presenting evidence in support of his self-defense theory. As stated, Lawrence presented evidence he acted in self-defense, and the trial court excluded very little of what Lawrence wanted to present on that issue. As the People aptly describe the trial court's ruling, the court allowed Lawrence "to present the evidence that was most probative of Buckner's alleged violent demeanor during the shooting, while . . . excluding questioning that was minimally relevant." Therefore, there was no due process violation (see *People v. Rogers* (2013) 57 Cal.4th 296, 346 [""excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense""]), and the error was still harmless under *Watson*. (See *People v. McNeal* (2009) 46 Cal.4th 1183, 1203 ["[b]ecause the trial court merely rejected some evidence concerning a defense, and did not preclude defendant from presenting a defense, any error is one of state law and is properly reviewed under . . .

Watson"]; *People v. Partida* (2005) 37 Cal.4th 428, 439 ["[a]bsent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error"].)

B. *Remand for Resentencing Is Not Appropriate*

At the time the trial court sentenced Lawrence in September 2017, Penal Code section 12022.5, subdivision (c), prohibited the court from striking the firearm enhancements under that statute. (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1127.) The Legislature, however, has since amended section 12022.5, subdivision (c), to give the trial court discretion to strike a firearm enhancement in the interest of justice. (See Sen. Bill No. 620 (2017-2018 Reg. Sess.) § 1.) Lawrence argues, the People concede, and we agree that Penal Code section 12022.5, subdivision (c), as amended, applies to Lawrence. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.)

The People argue, however, remand is not appropriate in this case because the trial court imposed the upper term of 10 years on the firearm enhancement and because the court's statements at sentencing indicated it would not have stricken the firearm enhancement even if it had the discretion to do so. Lawrence does not respond to this argument, other than to comment that "discretion is necessarily based on the facts of the particular case" and that the "need to balance case-specific, fact-based indicia of justice requires remand to the trial court." The People have the better argument.

Under Penal Code section 12022.5, subdivision (a), the trial court had discretion to impose the lower term of three years, the

middle term of four years, or the upper term of 10 years. The trial court exercised that discretion and imposed the upper term. Moreover, the trial court's exercise of discretion to impose the upper term on the firearm enhancement was case-specific and fact-based. The court selected the upper term for the enhancement based on "the vulnerability of the victim, the serious danger to society, and the increasing nature of [Lawrence's] criminal conduct." The court explained Buckner "was particularly vulnerable" because he was "actually running away when the majority, if not all, of the shots are fired, and he is hit multiple times." The court stated that it was "an incredibly dangerous crime" and that it was fortunate more people at the "crowded gas station" were not hit. The court emphasized that Lawrence continued to shoot after Buckner had run away and that "this crime was incredibly serious and the manner in which [Lawrence] so easily just shot that gun . . . was pretty chilling." Considering the reasons the court stated for its sentencing decision and the court's exercise of discretion to impose upper terms across the board, remand in this case is not warranted. (See *People v. McVey* (2018) 24 Cal.App.5th 405, 419 ["[i]n light of the trial court's express consideration of the factors in aggravation and mitigation, its pointed comments on the record, and its deliberate choice of the highest possible term for the firearm enhancement, there appears no possibility that, if the case were remanded, the trial court would exercise its discretion to strike the enhancement altogether"]; cf. *People v. Jones* (2019) 32 Cal.App.5th 267, 274 [where the trial court, on "the only count on which the court could have exercised leniency in sentencing," did not do so and instead imposed the upper term, the Court of Appeal concluded "the trial court would not have dismissed

defendant's prior serious felony even if it had discretion to do so" under amendments to Penal Code section 667, subdivision (a)(1)].)

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.